Affin Bank Bhd v Malayan Banking Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–972 OF 2002
LOW HOP BING, WAN ADNAN MUHAMAD AND AHMAD MAAROP JJCA
27 NOVEMBER 2008

Banking — Charge — Construction of — Charge over shares — Whether charge a floating charge or fixed charge

Banking — Charge — Floating charge — Nature and characteristics of

Banking — Securities for advances — Debentures — Debenture creating charge over present and future shares of borrower — Whether such charge a fixed or floating charge — Whether bank enjoyed priority over such charged shares

Companies and Corporations — Debenture — Construction — Whether charge over company's present and future shares a floating or fixed charge — Floating charge, nature and characteristics of

Words and Phrases — 'Floating charge' — Meaning of

Wembley Industries Holdings Bhd ('Wembley') created a debenture dated 10 July 1995 ('debenture 1') containing fixed and floating charges over all its assets, properties and undertakings, both present and future in favour of the plaintiff in consideration of banking facilities extended to Wembley. Pursuant to cl 3(1)(f) of debenture 1, Wembley charged, inter alia, all shares then owned or thereafter acquired by it by way of a first fixed charge to the plaintiff. Clause 5 of debenture 1 contained a restrictive covenant prohibiting Wembley from creating any encumbrances over the charged assets without the plaintiff's written consent. By three other even-dated debentures — similar in terms to debenture 1 — Wembley charged in favour of the debenture holders, by way of a first fixed charge, inter alia, shares owned or thereafter acquired by it. These three debentures were later novated to the plaintiff. All these four debentures were registered under s 108 of the Companies Act 1965. Subsequent to the execution of all the four debentures, Wembley acquired title to 8 million shares. Wembley then charged these

8 million shares to the defendant, which was put on notice that the plaintiff had a prior first fixed charge over the shares. However, the defendant sold the shares without any notice to the plaintiff. The plaintiff applied for and obtained declaratory orders to the effect that: (i) the plaintiff's four debentures had created a fixed specific charge over the 8 million shares; and (ii) the plaintiff's charge over the shares had priority over the defendant's charge. The defendant appealed to the Court of Appeal. The Court of Appeal had thus to determine whether, on a true construction of debenture 1, the plaintiff had obtained a fixed charge over the 8 million shares and had priority over the shares.

Held, dismissing the appeal with costs:

(1) A floating charge is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes (see paras 16 & 21); *The Governments Stock and Other Securities Investment Company Ltd v The Manila Railway Co Ltd & Ors* [1987] AC 81 (HL) followed.

(2) A floating charge has the following characteristics: (i) it is a charge on a class of assets of a company present and future; (ii) those assets are of a class which in the ordinary course of the business of the company would be changing from time to time; and (iii) the charge contemplates that until some further step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as it concerns the particular class of assets (see paras 16, 22, 24–25); *Re Yorkshire Woolcombers Association; Houldsworth v Yorkshire Woolcombers Association* (1903) LJR 635 followed.

(3) A floating charge is ambulatory and shifting in its nature, hovering over and floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. On the other hand, a specific charge is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined (see paras 16 & 24); *Illingworth v Houldsworth & Anor* [1904] AC 355 (HL) followed.

(4) In the instant case, the 8 million shares were not book debts and did not come within cl 3(1)(e) of debenture 1 governing book and other debts. These shares came specifically within the 'shares' purview of cl 3(1)(f).

The charge over the shares was one that fastened on ascertained and definite property. That was the hallmark of a specific fixed charge (see para 28).

(5) The floating charge housed in cl 3(2) of debenture 1 clearly excluded all the assets contained in cl 3(1). Further, cl 3(1)(f) specifically provided for a first fixed charge on 'all shares ... now owned or hereafter acquired by the Borrower'. The first fixed charge under cl 3(1)(f) was intended by the parties to include all the shares owned by the borrower at 10 July 1995 or thereafter acquired by the borrower, ie the 8 million shares. Such first fixed charge had priority over any subsequent charge created by Wembley in favour of the defendant (see paras 20 & 29).

(6) The defendant's argument that the words 'The Borrower as beneficial owner' in cl 3 restricted the fixed charge to such assets which beneficially belonged to the borrower at the date of the debenture, ie 10 July 1995, had no merit. Those words were not to be construed disjunctively or in isolation. They had to be read together with the other operative and integral parts of cl 3, especially cl 3(1)(f), which brought within its purview all shares 'now owned or hereafter acquired by the Borrower' which obviously included the 8 million shares (see para 31).

[Bahasa Malaysia summary

Wembley Industries Holdings Bhd ('Wembley') membuat satu debentur bertarikh 10 Julai 1995 (debentur 1) yang mengandungi gadaian-gadaian tetap dan terapung ke atas semua asetnya, hartanah dan aku janji, sekarang dan masa hadapan dengan berpihak kepada plaintif dengan mengambilkira kemudahan perbankan yang diberikan kepada Wembley. Menurut klausa 3(1)(f) debentur 1, Wembley menggadaikan antara lain, semua saham-saham yang dahulunya dimiliki atau kemudiannya diperolehi olehnya melalui gadaian tetap pertama kepada plaintif. Klausa 5 debentur 1 mengandungi waad terhad menghalang Wembley daripada membuat sebarang sekatan terhadap aset-aset yang dicagarkan tanpa persetujuan bertulis plaintif. Melalui tiga lagi debentur yang sama tarikh — yang sama terma dengan debentur 1 — Wembley menggadaikan berpihak kepada pemegang debentur, melalui gadaian tetap pertama, antara lain, saham-saham yang dimiliki atau kemudiannya diperolehi olehnya. Ketiga-tiga debentur ini kemudiannya dinovasi kepada plaintif. Keempat-empat debentur ini didaftarkan di bawah s 108 Akta Syarikat 1965. Berikutan pelaksanaan keempat-empat debentur tersebut, Wembley memperolehi hakmilik ke atas 8 juta saham. Wembley kemudian menggadai 8 juta saham ini kepada defendan, yang diberi notis bahawa plaintif mempunyai kelebihan utama gadaian tetap ke atas saham-saham tersebut. Namun begitu defendan menjual saham-saham tersebut tanpa sebarang notis kepada plaintif. Plaintif memohon untuk dan

mendapat perintah deklarasi yang membawa kesan: (i) empat debentur plaintif telah membentuk gadaian tetap tertentu ke atas 8 juta saham tersebut; dan (ii) gadaian plaintif ke atas saham-saham tersebut mempunyai keutamaan ke atas gadaian defendan. Defendan merayu ke Mahkamah Rayuan. Mahkamah Rayuan oleh itu perlu menentukan sama ada, atas pembentukan sebenar debentur 1, plaintif telah memperolehi gadaian tetap ke atas 8 juta saham tersebut dan mempunyai keutamaan ke atas saham-saham tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Gadaian terapung ialah satu gadaian berbentuk ekuiti ke atas aset-aset selama tempoh sesuatu hal yang diberikan perhatian. Ia mengikat kepada subjek yang digadaikan dalam pelbagai yang mana berlaku dari masa ke semasa. Ia adalah intipati sesuatu gadaian bahawa ia tetap dorman sehingga akujanji yang digadaikan tidak lagi dipertikaikan atau sehingga orang yang pada pihaknya gadaian tersebut dibuat,mencelah (lihat perenggan 16 & 21); *The Governments Stock and Other Securities Investment Company Ltd v The Manila Railway Co Ltd & Ors* [1987] AC 81 (HL) diikut.

(2) Suatu gadaian terapung mempunyai sifat-sifat seperti berikut: (i) ia adalah satu gadaian ke atas satu kelas aset sesebuah syarikat yang kini dan di masa hadapan; (ii) aset-aset tersebut adalah adalah dari satu kelas yang mana di dalam perjalanan biasa perniagaan tersebut akan berubah dari masa ke semasa; dan (iii) gadaian tersebut dikira sehingga beberapa langkah lanjutan diambil oleh atau bagi pihak mereka yang berminat dengan gadaian tersebut, syarikat itu akan meneruskan perniagaannya dengan cara biasa asalkan ia mengambilkira kelas aset yang tertentu (lihat perenggan 16, 22, 24–25); *Re Yorkshire Woolcombers Association; Houldsworth v Yorkshire Woolcombers Association* (1903) LJR 635 diikut.

(3) Gadaian terapung adalah bersifat ambulatori dan berubah-ubah, meliputi dan terapung dengan hartanah yang diniatkan untuk memberi kesan sehingga sesuatu keadaan terjadi atau suatu tindakan dilakukan yang menyebabkan ia menjadi tetap dan melekap kepada subjek gadaian dalam lingkungan capaiannya. Sebaliknya, satu gadaian tertentu ialah sesuatu yang tidak lebih daripada melekap kepada hartanah yang ditentukan dan pasti atau hartanah yang boleh ditentukan dan dipastikan (lihat perenggan 16 & 24); *Illingworth v Houldsworth & Anor* [1904] AC 355 (HL) diikut.

(4) Dalam kes ini, saham 8 juta tersebut bukan buku hutang dan tidak termasuk dalam buku kawalan dan hutang-hutang lain debentur 1 klausa 3(1)(e), Saham-saham ini termasuk secara tepat dalam skop

'saham' klausa 3(1)(f). Gadaian ke atas saham-saham tersebut adalah yang melekap ke atas hartanah yang ditentukan dan dipastikan. Itu adalah ciri gadaian tetap tertentu (lihat perenggan 28).

(5) Gadaian terapung yang terdapat dalam klausa 3(2) debentur 1 secara jelas mengecualikan semua aset yang terdapat dalam klausa 3(1). Selanjutnya, klausa 3(1) memperuntukkan secara terperinci bagi gadaian tetap pertama ke atas 'semua saham ... yang dimiliki kini atau yang kemudiannya diperolehi oleh Peminjam'. Gadaian tetap pertama di bawah klausa 3(1)(f) diniatkan oleh pihak-pihak terlibat untuk merangkumi semua saham yang dimiliki oleh peminjam pada 10 Julai 1995 atau selepasnya diperolehi oleh peminjam, iaitu 8 juta saham itu. Gadaian tetap pertama sedemikian mempunyai keutamaan ke atas mana-mana gadaian seterusnya yang dibuat oleh Wembley yang berpihak kepada defendan (lihat perenggan 20 & 29).

(6) Hujahan defendan bahawa perkataan-perkataan 'Peminjam sebagai pemilik benefisiari' dalam klausa 3 menghadkan gadaian tetap kepada aset sedemikian yang secara benefisiari adalah kepunyaan peminjam pada tarikh debentur tersebut, iaitu 10 Julai 1995, tidak mempunyai merit. Perkataan-perkataan tersebut tidak boleh ditafsirkan secara berasingan. Ia perlu dibaca bersama dengan bahagian-bahagian operatif dan penting klausa 3(1) terutamanya klausa 3(1)(f), yang membawa dalam skopnya semua saham 'yang dimiliki kini atau yang kemudiannya diperolehi oleh Peminjam' yang secara jelasnya meliputi saham 8 juta tersebut (lihat perenggan 31).]

Notes

For a case on charge generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2027.

For a case on construction of charge, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2027.

For a case on construction of debenture see 3(1) *Mallal's Digest* (4th Ed, 206 Reissue) para 122.

For cases on securities for advances generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2097–2270.

Cases referred to

Brightlife Ltd, Re [1986] 3 All ER 673, Ch D (distd)

Governments Stock and Other Securities Investment Company Ltd v The Manila Railway Co Ltd & Ors, The [1987] AC 81, HL (folld)

Illingworth v Houldsworth & Anor [1904] AC 355, HL (folld)

Lysaght v Edwards (1876) 45 LJ Ch 554, Ch D (refd)

Spectrum Plus Ltd; National Westminster Bank Plc v Spectrum Plus Ltd & Ors, Re [2005] 4 All ER 209, HL (distd)

A *Yorkshire Woolcombers Association; Re; Houldsworth v Yorkshire Woolcombers Association* [1903] LJR 635, CA (folld)

Legislation referred to

Companies Act 1965 s 108, Form 34

B

Appeal from: Originating Summons No D3–24–25 of 2000 (High Court, Kuala Lumpur)

C *PS Gill (Harjit Singh with him) (Gill & Tang) for the appellant.*
Lim Chee Wee (Ruth Garneh Maran with him) (Skrine) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

D APPEAL

[1] Parties are referred to in their respective capacities in the High Court.

E **[2]** On 25 November 2002, vide originating summons, Malayan Banking Bhd ('the plaintiff') obtained the following declaratory orders:

(1) That the plaintiff's four debentures had created a fixed specific charge over 5.6 million and 2.4 million shares in Kuo Shinn Bricks Industries
F Sdn Bhd ('the 8 million shares'); and

(2) That PhileoAllied Bank's charge over the 8 million shares has priority over the subsequent charge in favour of Affin Bank ('the defendant').

(collectively 'the declaratory orders').

G

[3] This is the defendant's appeal against the declaratory orders.

FACTUAL BACKGROUND

H

[4] In consideration of banking facilities granted by PhileoAllied Bank to Wembley Industries Holdings Bhd ('Wembley'), Wembley created a debenture dated 10 July 1995 ('debenture 1') containing fixed and floating charges over all its assets, properties and undertakings, both present and
I future (excluding a piece of property in Klang) as security in favour of PhilleoAllied Bank.

[5] Debenture 1 was duly registered pursuant to s 108 of the Companies Act 1965 ('s 108').

[6] By way of a first fixed charge, Wembley charged, inter alia, all shares then owned or thereafter acquired by it, under cl 3(1)(f) of debenture 1. (A reference hereinafter to a clause is a reference to that clause in debenture 1). A

[7] Clause 5 contains a restrictive covenant whereby Wembley undertook that it shall not, during the subsistence of the debenture, without the consent in writing of the PhileoAllied Bank, create any encumbrance over the charged assets. Form 34, filed pursuant to s 108, also states, inter alia, that the creation of subsequent charges is restricted or prohibited. B

C

[8] On 10 July 1995, Wembley created three similar debentures ('the subsequent three debentures') in favour of three other financial institutions viz Overseas Union Bank Bhd, United Overseas Bank Bhd and Chung Khiaw Bank (M) Bhd.

D

[9] All the four debentures created by Wembley ranked pari passu with each other. In all the said debentures Wembley charged in favour of the debenture holders, by way of a first fixed charge, inter alia, shares owned or thereafter acquired by it. E

[10] The subsequent three debentures were also registered under s 108. They were novated to PhileoAllied Bank on 27 May 1997 by way of three novation agreements, and PhileoAllied Bank became entitled to the benefits and rights thereunder. F

[11] Subsequent to the execution of all the four debentures, Wembley acquired title to the 8 million shares. Wembley then charged the 8 million shares to BSN Commercial Bank (Malaysia) Bhd (now Affin Bank) by way of two memoranda of deposit, one for 5.6 million shares, and another for the balance of 2.4 million shares. G

[12] Affin Bank was put on notice that PhileoAllied Bank has a prior first fixed charge over the 8 million shares as soon as they were acquired by Wembley. Affin Bank then sold the 8 million shares without giving any notice to or informing PhileoAllied Bank of the proceeds of sale. H

[13] PhileoAllied Bank then applied vide the originating summons and obtained the declaratory orders. I

[14] Pursuant to the subsequent merger between PhileoAllied Bank and Malayan Banking Bhd ('MBB'), by consent order, MBB has been substituted

as plaintiff in the originating summons. Similarly, the merger between BSN and Affin Bank resulted in the substitution of Affin Bank as the defendant in place of BSN.

[15] On 30 May 1998, receivers and managers were duly appointed over the charged assets of Wembley under all the four debentures.

FIXED OR FLOATING CHARGE?

[16] Defendant's learned counsel Mr PS Gill (Mr Harjit Singh with him) referred to cl 3(1)(e), (f) and cl 3.2 to support their submission that the learned judge had erred in making the declaratory orders. They relied on:

(1) *Re Spectrum Plus Ltd, National Westminster Bank Plc v Spectrum Plus Ltd & Ors* [2005] 4 All ER 209;

(2) In *Re Yorkshire Woolcombers Association; Houldsworth v Yorkshire Woolcombers Association* [1903] LJR 635, at p 640;

(3) *Illingworth v Houldsworth & Anor* [1904] AC 355 (HL);

(4) *Re Brightlife Ltd* [1986] 3 All ER 673 (HC);

(5) *The Governments Stock and Other Securities Investment Company Ltd v The Manila Railway Co Ltd & Ors* [1987] AC 81, at p 86 (HL);

(6) *Company Charges* by William James Gough (1978) p 61; and

(7) *Lysaght v Edwards* (1876) 45 LJ Ch 554, at p 558.

[17] Mr Lim Chee Wee (assisted by Ms Ruth Garnet Maran) advocated for the plaintiff that the learned judge had correctly held that the plaintiff has a first fixed charge over the 8 million shares the moment Wembley acquired title to the shares and before Wembley purported to charge the shares to Affin Bank, because in law, there can be a specific charge over future property.

[18] In our judgment, the question for determination in the instant appeal may be formulated as follows:

> Upon a true construction of cl 3(1)(e), (f) and cl 3(2) of debenture 1 dated 10 July 1995, did the plaintiff obtain a fixed charge over the 8 million shares subsequently acquired by Wembley on 27 July 1995 and 1 November 1995, and have priority over them?

[19] The resolution to the above question requires the reproduction of the relevant portions of cl 3(1),(e),(f) and cl 3(2) as follows:

3. The Borrower, as beneficial owner and as continuing security for the payment and discharge of the Secured Debt and for the observance and performance by the Borrower of the Borrower's other obligations under the Facility Agreement, hereby charges to the Bank all the Security Assets as follows:

(1) *By way of a first fixed charge;*

(a) ...

(b) ...

(c) ...

(d) ...

(e) *All present or future book and other debts and monies and monetary claims now or at any time hereafter due, owing, payable or incurred to the Borrower*, together with the full benefit of all rights, securities guarantees and indemnities of any nature now or at any time hereafter enjoyed or held by the Borrower in respect thereof (including, without limitation, all liens, reservations of title and rights of tracing enabling the Borrower to enforce any of such debts or claims);

(f) All *shares* of or in any person *now owned or hereafter acquired by the Borrower* and all rights to subscribe for, convert other securities into or otherwise acquire any *shares* of or in any person to *which the Borrower may now or hereafter be or become entitled*, together with, in the case of each of the foregoing; all dividends, interest and other income and all benefits and other rights of whatever kind attaching thereto, deriving therefrom or incidental thereto; and

(2) By way of *a first floating charge all its other assets undertakings* whatsoever and wheresoever situate both present and future (*not otherwise effectively charged to the Bank under Clause 3(1) hereof*) including the Borrower's *current assets* which expression shall mean raw materials work-in-progress, fuel, unfinished goods, stock or spare parts wherever stored, placed or kept both present and future book debts, cash, bank balances, account receivables of whatsoever nature, goodwill and uncalled capital.

(Emphasis added.)

[20] As cl 3(1) refers to a first *fixed charge 'on all shares now owned or hereafter acquired by the Borrower'* and cl 3(2) provides for a *floating charge* on all other assets, it is appropriate for us to examine these two categories of charges respectively.

[21] A *floating security* is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the *varying condition* in which it happens to be from time to time. It is the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes: per Lord Macnaghten in *The Governments Stock and Other Securities Investment Company Ltd*, at p 86.

[22] A *floating charge* is said to have three characteristics viz:

(1) If it is a charge on a class of assets of a company present and future;

(2) If those assets are of a class which in the ordinary course of the business of the company would be changing from time to time; and

(3) If it appears that it is contemplated by the charge that, until some further step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerns the particular class of assets.

(per Romer LJ in *Re Yorkshire Woolcombers Association*).

[23] In *Company Charges* (1978) at p 61, William James Gough restated the three characteristic elements of a *floating charge* as follows:

(1) Initially the charge is to float over the present and future property of the company subject thereto, that is to say, it does not fasten on or attach to any particular property or specific property;

(2) In the meantime, the company debtor is able to assign property subject to the charge to third persons whether absolutely by way of sale or conditionally by way of security, so as to confer upon the third party a good title as against the creditor secured under the floating charge;

(3) Subsequently, in certain events the charge may 'crystallise', that is to say, be converted thenceforth from an assignment by way of floating charge into one by way of specific charge which, once having lost its floating character, is in all respects subject to the general principles of property law in the same manner as any specific charge.

[24] The three characteristics of a *floating charge* expounded in *Re Yorkshire Woolcombers Association*, were affirmed by the House of Lords in *Illingworth*, where at p 358, Lord Macnaghten defined what a *floating charge* is in contrast to a specific charge. The learned Law Lord explained:

(1) A *floating charge* is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect

until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp; and

(2) A *specific charge* is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined.

[25] The well known three characteristics of a *floating charge* set out in *Re Yorkshire Woolcombers Association*, were also applied in *Re Brightlife Ltd*, by Hoffmann J who in dealing with the company's freedom to collect its debts and pay the proceeds into its bank accounts, at pp 676–677, said:

> In this debenture, the significant feature is that Brightlife was free to collect its *debts* and pay the proceeds into its bank accounts. Once in the account, they would be outside the charge over debts and at the free disposal of the company. In my judgment a right to deal in this way with the charged assets for its own account is a badge of a *floating charge* and is inconsistent with a fixed charge.
>
> (Emphasis added.)

[26] In *Re Spectrum Plus Ltd*, the speech of Lord Scott shows that if a security has Romer LJ's third characteristic ie the borrower's freedom to carry on its business in the ordinary way, so far as concerns the particular class of assets, that security qualified as a *floating charge*, and could not be a *fixed charge*, whatever might be its other characteristics. The learned Law Lord said that the essential characteristic that distinguishes a floating charge from a fixed charge is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime, the chargor is left free to use the charged asset and to remove it from the security. There, the factual background shows that:

(1) Spectrum had opened a current account with National Westminster Bank ('the bank'), obtained an overdraft facility and executed a debenture to secure its indebtedness to the bank. The debenture included, inter alia, '... (a) *specific charge (of) all book debts and other debts* ... now and from time to time due or owing to (Spectrum)';

(2) Paragraph 5 of the debenture refers to book debts and other debts, as follows:

> 5 With reference to the book debts and other debts hereby specifically charged, (Spectrum) shall pay into (Spectrum's) account with the bank all moneys which it may receive in respect of such debts and shall not without the prior consent in writing of the bank sell factor discount or otherwise charge or assign the same in favour of any other person or purport to do so and (Spectrum) shall if called upon to do so by the bank from time to time execute legal assignments of such book debts and other debts to the bank.

(3) Subject to the overdraft limit, Spectrum was free to draw on the account for its business purposes.

(4) After opening the account, Spectrum collected its book debts, paid them into its account and drew on the account as it wished for its business purposes.

(5) Spectrum later went into voluntary liquidation.

(6) The bank applied for a declaration that the debenture had created a fixed charge over Spectrum's book debts.

(7) Certain of Spectrum's preferential creditors, who would have been entitled to the proceeds of the book debts in priority to the bank if the charge were a floating charge, resisted the application.

(8) In the High Court, the Vice-Chancellor held the charge to be a floating charge.

(9) The Court of Appeal disagreed and allowed the bank's appeal.

(10) On appeal by the preferential creditors, *the House of Lords considered*, inter alia, *whether a charge over present and future book debts, where the chargor could deal with its debtors and collect the debts which must be placed in a designated account with the chargee bank, and may freely draw on the account for its business purposes within the overdraft limit, was capable in law of being a fixed charge*. The House of Lords reinstated the decision of the High Court and held that the debenture, although expressed to grant the bank a fixed charge over Spectrum's book debts, had in law granted only a floating charge.

[27] It is to be noted that both *Re Brightlife Ltd* and *Re Spectrum Plus Ltd*, dealt with a charge over present and future book and other debs. The charge over present and future *book and other debts* is analogous to the charge contained in cl 3(1)(e) in the instant appeal. A charge over book debts in cl 3(1)(e) gives the charger the freedom to collect book and other debts, and to use them in the ordinary way and so qualifies as a floating charge.

[28] However, in the instant appeal, book and other debts are not called into question. The instant appeal requires the resolution of the charger over shares. A charge over book and other debts differs materially from a charge over the 8 million shares, under consideration in the instant appeal. The 8 million shares are not book debts and certainly do not come within cl 3(1)(e) governing book and other debts. These shares come specifically within the 'shares' purview of cl 3(1)(f). The charge over the shares is one that fastens on ascertained and definite property, and that is the hallmark of a specific fixed

charge. I am of the view that the book and other debts in *Brightlife Ltd* and *Re Spectrum Plus Ltd* and the shares in the instant appeal are readily distinguishable.

[29] Further, cl 3(2) provides for 'a first *floating charge* of all its other assets' 'present and future (not otherwise effectively charged to the bank under clause 3(1) hereof)'. The floating charge housed in cl 3(2) clearly excludes all the assets contained in cl 3(1). More specifically cl 3(1)(f) provides for a *first fixed charge* on 'all shares ... now owned or hereafter acquired by the Borrower'. Hence, the first fixed charge in cl 3(1)(f) is intended by the parties to include all the shares now owned ie 10 July 1995 or thereafter acquired by the borrower ie the 8 million shares.

[30] Clause 3(1)(f) therefore clearly vests in the plaintiff a first fixed charge over, inter alia, the 8 million shares. Such first fixed charge has priority over any subsequent charge created by Wembley in favour of BSN.

[31] Regarding the defendant's contention that the opening words viz 'The Borrower as beneficial owner' in cl 3 are to restrict the fixed charge only to such assets which beneficially belong to the borrower at the date of the debenture ie 10 July 1995, I am of the view that these words are not to be construed disjunctively or in isolation. They must be read together with the other operative and integral parts of cl 3, especially cl 3(1)(f), which brings within its purview all shares 'now owned or *hereafter acquired by the Borrower*' which obviously include the 8 million shares subsequently acquired by the defendant.

[32] *Lysaght v Edwards* (1876) 45 LJ Ch 554, cited for the defendant, concerns the effect of a contract of sale of an estate. It does not revolve around the construction of the clauses such as cl 3(1)(e), (f) and cl 3(2) in the instant appeal. It is therefore irrelevant to the instant appeal.

CONCLUSION

[33] On the foregoing grounds, we give an affirmative answer to the above question and hold that the decision of the learned judge is free from any error. We therefore dismiss this appeal with costs and sustain the declaratory orders. Deposit to the plaintiff on account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon